ARBITRATION ACT: STAY AND APPEAL ISSUES

FINAL REPORT 103

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Debra Hathaway, Counsel, conducted the main research and analysis for this project and wrote the report. Some preliminary research was done by William Hurlburt QC, ALRI Consultant, and Karen McDougall, Consultant. Peter Lown QC, Director, and Sandra Petersson, Research Manager, provided editorial support. Student research assistance was supplied by Suzette Golden-Greenwood, Jarrod Hone, Melissa Preston, Jenna Reist and Lara Yeung. The report was prepared for publication by Barry Chung.

Summary

A modern *Arbitration Act* became law in Alberta in 1991. In the two decades since, certain issues have arisen in Alberta case law which affect the ideal functioning of the arbitration system. The Alberta Law Reform Institute (ALRI) explored these issues in a 2012 Report for Discussion and received consultation feedback from arbitrators, lawyers, organizations, in-house programs and various Canadian Bar Association (Alberta) sections. The Final Report contains ALRI's recommendations for reform, which are outlined in this Summary.

Fundamental Principles Underlying the Act

ALRI reaffirms the two fundamental principles underlying the Alberta Act: the principle of party control and the principle of restricted court intervention. ALRI relied on these principles when formulating final recommendations in order to maintain conceptual consistency within the Alberta Act.

Stay Issues

The first issue concerns partial stays of competing court proceedings under section 7(5). Partial stays work well when arbitrable and litigable issues are reasonably separable, which is a prerequisite to the operation of section 7(5). But what should a court do when they cannot be reasonably separated or the competing litigation involves additional parties who are not subject to the arbitration agreement or both? One approach provides that the arbitration agreement must be enforced even if multiplicity of proceedings results – in other words, what has agreed to be arbitrated must be arbitrated. Another approach interprets section 7(5) as conferring independent judicial discretion to stay the arbitration, despite the existence of an arbitration agreement between some or all the parties, and to require all issues to be litigated in court by the parties.

Consultation feedback almost exclusively supported a strict enforcement of the arbitration agreement. ALRI agrees. If section 7(5) is interpreted as creating an independent judicial discretion to stay arbitrations, it undermines the purpose and effectiveness of the Alberta Act. Therefore, on the basis of the two fundamental underlying principles, ALRI recommends that section 7(5) be repealed. Arbitration parties must arbitrate their issues as agreed, despite the presence of additional litigable issues or additional parties.

The Final Report examines various other issues raised in this area by consultation respondents to the Report for Discussion. One suggestion persuaded ALRI to make a recommendation for change. Under section 7(1), a court must stay competing court proceedings unless an exception applies under section 7(2). An exception exists under section 7(2)(e) if the matter in dispute is a proper one for default or summary judgment. All the other exceptions concern invalidity of the arbitration agreement or bad faith on the part of the applicant for a stay. These situations justify allowing litigation to prevail over an arbitration agreement. The same cannot be said when the competing litigation is simply amenable to default or summary judgment. Applying the principle of party control consistently in the Alberta Act, ALRI recommends that section 7(2)(e) be repealed. If a party who has agreed to arbitrate has instead absconded or refuses to participate, the arbitral award should be made accordingly in that party's absence and then enforced like any other arbitral award. Similarly, if there are no disputed material facts at issue in an arbitration, the arbitral award should be made summarily and also enforced like any other arbitral award. There is no need to override arbitration agreements so that a court can issue default or summary judgment.

Appeal Issues

Alberta courts have produced some strikingly divergent lines of case law on issues which essentially concern how accessible arbitral appeals should be. The policy basis of appeals under section 44 of the Alberta Act seems to be unclear, ambiguous or even contradictory. The legislation provides appeal routes and yet undermines them at the same time. ALRI has therefore rethought the role of arbitral appeals in a more fundamental way and proposes a new balance between the competing policy considerations.

ALRI recommends that arbitration parties should continue to be able, by agreement, to appeal an arbitral award to the Court of Queen's Bench on whatever basis the parties decide. This promotes the principle of party control over the arbitral process. Consultation feedback also favoured retaining such consensual appeals.

However, ALRI proposes that this should be the only appeal route. ALRI recommends repealing non-consensual appeals on a question of law by leave of the court. Nova Scotia and Quebec similarly do not provide such an appeal route. Strengthening the principle of restricted court intervention in the Alberta Act also enhances the principle of party control. Although consultation feedback was more mixed on this issue, a slight edge of respondents advocated repealing these appeals as well.

Parties would still be able to apply to court in appropriate circumstances to set aside an arbitral award under section 45, the Act's equivalent of judicial review. Section 45 addresses fundamental issues relating to jurisdiction, procedural fairness and fraud.

Repealing non-consensual appeals on a question of law by leave of the court renders redundant one of the other issues originally explored in the Report for Discussion, namely, whether a public interest requirement must be met before leave to appeal is granted.

A third appeal issue dealt with in the Report for Discussion remains relevant, however. Section 44(3) says that a party may not appeal a question of law that the parties expressly referred to the arbitral tribunal for decision. Alberta case law is sharply divided over what this means. A wide interpretation essentially blocks the appeal process and makes any appeal on a question of law virtually impossible. No consultation respondent supported the wide view and the feedback called for repeal of this provision. Whatever purpose this provision might have served in limiting appeals on a question of law by leave of the court, it serves no good purpose to apply it to consensual appeals on a question of law. ALRI recommends its repeal.

The Final Report also examines various other appeal-related issues raised by consultation respondents. However, these issues did not result in any recommendation for change.

Different Rules for Different Types of Arbitration?

The Report for Discussion speculated whether different rules concerning stays and appeals should perhaps be enacted for parties engaged in commercial arbitration, as opposed to those engaged in other types of arbitration such as consumer, family or community disputes where power imbalances might be found. ALRI is sympathetic to the idea that special treatment and protection may sometimes be needed for these other types of arbitration parties. However, any special protection requiring mandatory provisions should be contained in the various specialized statutes dealing with family or consumer law, not in a general arbitration statute like the Alberta Act which is largely designed to apply by default if the parties have not made alternate arrangements. A full and proper determination of the specifics of such specialized treatment would require a further in-depth project and extensive consultation with Albertans.

Transitional Issues

An amended Alberta Act should come into force on a specific date following a short period of time sufficient for parties to review their existing arbitration agreements and make changes if necessary. The amendments should apply to any arbitration commenced on or after the date on which the amendments came into force, regardless of the date on which the arbitration agreement was made.

Recommendations

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RECOMMENDATION 9
Amendments to the Alberta Act implementing these recommendations should come into force following a stated period of time sufficient for parties to review their existing arbitration agreements and make changes if necessary. 56

Table of Abbreviations

LEGISLATION

Alberta Act	*Arbitration Act*, RSA 2000, c A-43
BC Act	*Arbitration Act*, RSBC 1996, c 55
UK Act	*Arbitration Act 1996* (UK), c 23
International Act	*International Commercial Arbitration Act*, RSA 2000, c I-5
Ontario Act	*Arbitration Act, 1991*, SO 1991, c 17
Uniform Act	*Uniform Arbitration Act*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/us/Arbitrat_En.pdf>

LAW REFORM PUBLICATIONS

ALRI RFD	Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues*, Report for Discussion 24 (2012)
ALRI Report	Institute of Law Research and Reform (Alberta), *Proposals for a New Alberta Arbitration Act*, Report 51 (1988)

SECONDARY SOURCES

Commercial Arbitration in Canada	J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration*, loose-leaf (consulted in August 2013), (Aurora, Ont: Canada Law Book, 2012)
Construction Law in Canada	The Honourable Mr Justice Leonard Ricchetti & Timothy J Murphy, *Construction Law in Canada* (Markham, Ont: LexisNexis Canada, 2010)

CHAPTER 1

Introduction

A. Alberta's Arbitration Act

[1] A modern *Arbitration Act* became law in Alberta in 1991.[1] The statute was largely based on recommendations made by the Alberta Law Reform Institute (then called the Institute of Law Research and Reform).[2] ALRI's recommendations were also supplemented by the government during the implementation process. A main principle of the modern Act is to limit and delineate court intervention in arbitration.

[2] The Alberta Act has now been governing arbitration in this province for over two decades. During that time, Alberta case law has identified three notable issues which affect the ideal functioning of the arbitration system. The first issue concerns partial stays of court proceedings under section 7(5). If a court cannot grant a partial stay of litigation because the arbitrable and litigable issues are not reasonably separable, does section 7(5) confer on the court an independent discretion to stay the arbitration instead? The second and third issues both concern appeals to the Court of Queen's Bench under section 44. Must a public interest requirement be present before leave to appeal can be granted under section 44(2)? Do the requirements of section 44(3) actively work to negate the entire appeal process in most cases?

[3] Examining the two appeal issues which arise out of section 44 reveals recurring policy tensions pointing to a deeper underlying issue: what is or should be the proper relationship between arbitration and the courts? Is it time to rethink the role of arbitral appeals in a more fundamental way? Could striking a new balance between competing policy considerations mean doing away with some or all appeals?

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[1] *Arbitration Act*, SA 1991, c A-43.1, now RSA 2000, c A-43 [Alberta Act]. It governs arbitration between Albertans or between Albertan and Canadian parties. Commercial arbitration between Albertan and international parties is governed by the *International Commercial Arbitration Act*, SA 1986, c I-6.6, now RSA 2000, c I-5 [International Act].

[2] Institute of Law Research and Reform (Alberta), *Proposals for a New Alberta Arbitration Act*, Report No 51 (1988) [ALRI Report].

[4] Accordingly, ALRI undertook a project to review these issues and to recommend appropriate statutory change where needed. ALRI was guided in this endeavour by a renewed commitment to the fundamental principles on which the Alberta Act is based.

B. Framework of the Project

[5] In August 2012, ALRI published Report for Discussion 24 addressing these issues.[3] The RFD posed open-ended questions for consultation rather than presenting preliminary recommendations formulated in advance. This approach was used because all opposing sides of the issues could be considered credible and supportable in their own ways. Appropriate recommendations would depend ultimately on wider policy decisions based on the fundamental principles underlying the Act. An open-ended debate was therefore of greater benefit to advise and guide ALRI.

[6] ALRI consulted with stakeholders in this area by distributing the RFD as widely as possible. In addition to the legal profession, academia and the judiciary, the RFD was also sent to non-lawyer advocacy and industry groups and to participants and practitioners in the arbitration field. This consultation process resulted in the submission of 17 sets of comments to ALRI. The feedback was thoughtful and helpful, although not every respondent commented on each issue raised by the ALRI RFD. Consultation feedback was also quite mixed and sometimes there was only a narrow margin in support of one side of an issue over the other. Respondents also submitted their own reform ideas about how to fix various problems. ALRI considered each of those suggestions when formulating the final recommendations contained in this Report.

C. Outline of this Report

[7] Following Chapter 1's general introduction, Chapter 2 discusses the fundamental principles which underlie the Alberta Act. Chapters 3 and 4 then apply those principles in a logical and consistent manner to the

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[3] Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues*, Report for Discussion 24 (2012) [ALRI RFD].

issues concerning stays and appeals. Chapter 5 addresses transitional matters arising out of implementation of ALRI's recommended amendments to the Alberta Act.

CHAPTER 2

Fundamental Principles

A. Introduction

[8] To maintain conceptual consistency within the Alberta Act, ALRI revisited the fundamental principles underlying the legislation. These principles provided the basis for arbitration reform when the Alberta Act was first enacted. Following discussion, ALRI reached consensus about how these principles should be applied when making current recommendations about sections 7 and 44 of the Act, as well as the other issues raised by ALRI respondents. The reasoning and conclusions expressed in this chapter will ground the recommendations contained in the rest of this Report.

B. The Principle of Party Control

[9] At its core, arbitration is a private and consensual means of dispute resolution. It is private because arbitration operates outside the public court system and is funded by the parties alone. It is consensual because all aspects of an arbitration must be personally agreed by the parties. This means that consensual arbitration "is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes."[4]

[10] The law of arbitration rests on the principle of party control.[5] The parties' freedom to contract governs the arbitration process and must be respected. As a general rule, party control means that the parties can make whatever agreement they want concerning what is to be arbitrated, how issues will be identified, how the arbitrator will be chosen and what the rules of the arbitration will be. The parties agree to participate in the

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[4] *Astoria Medical Group v Health Insurance Plan of Greater New York*, 182 NE 2d 85 at 87 (NY Ct App 1962).

[5] In the ALRI RFD, this principle was referred to as "the doctrine of party autonomy," which is simply different terminology for the same concept.

arbitration. No one can be ordered by a court, for example, to arbitrate or not to arbitrate.[6]

[11] Of course, the principle of party control can be overcome or modified by express legislative provision.[7] However, a legislature will only take this step if a much greater social value or social need requires it. Such statutory interference is relatively rare and should not occur except in the most compelling circumstances. For example, in order to prevent strikes during the life of a collective agreement, the Alberta *Labour Relations Code* overrides the parties' freedom to contract and requires that every collective agreement must contain a dispute resolution mechanism to address breaches. Arbitration is statutorily deemed to be the default mechanism and so, to this extent, parties are forced to arbitrate.[8]

[12] Party control is a fundamental principle underlying the Alberta Act.[9] It is for this reason that section 3 states: "[t]he parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act" apart from a few specified exceptions. The Alberta Act is basically designed to apply by default only in those areas where the parties have not made their own arrangements.

[13] When the Uniform Law Conference of Canada modeled its Uniform Act on the Alberta Act, it also stressed the importance of party control:[10]

> Generally speaking, the only interests involved in an arbitration are those of the parties. While it may be argued that a whole mandatory scheme should be imposed on them for their own good, we see no justification for doing so. Party control is one fundamental principle upon which arbitration law should be based.

[14] No principle is absolute, of course. In the Alberta Act and Uniform Act, the principle of party control is balanced against the principle of

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[6] J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration*, loose-leaf (consulted in August 2013) (Aurora, Ont: Canada Law Book, 2012) at para 2:100.10 [*Commercial Arbitration in Canada*].

[7] *Commercial Arbitration in Canada* at para 2:100.10.

[8] *Labour Relations Code*, RSA 2000, c L-1, ss 134-146.

[9] ALRI Report at 46.

[10] Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August, 1989) at 123.

equal and fair treatment. Party control should be overridden only when needed to ensure equal treatment and fairness between the parties.[11]

[15] In our consultation, the strongest and most consistent theme expressed by respondents was an unyielding defence of the principle of party control. Even when a respondent occasionally recommended overriding the principle in new ways, it was for the purpose of promoting a greater use of arbitration rather than that of making litigation an easier option.

[16] ALRI affirms the principle of party control as a fundamental principle of the Alberta Act. Reform recommendations should clearly reflect this principle's centrality. Ambiguity in this area can lead to interpretations of the Alberta Act which undermine this principle and the purpose of the Act.

[17] The principle of party control is a two-edged sword, of course, and cuts both ways. It places responsibility squarely on the parties to ensure that their arbitration agreements are well-drafted documents. Arbitrating parties should not insist on party control when it benefits them, yet expect the statute or courts to step in and fix problems stemming from poorly prepared arbitration agreements over which the parties themselves exercise control.

[18] ALRI also acknowledges that the principle of party control must continue to be balanced against the principle of equal and fair treatment. Where the validity of the arbitration agreement is at issue or where a strong public policy concern exists about fairness, the principle of party control should be tempered.

RECOMMENDATION 1

Reform of the Alberta Act should respect the fundamental principle of party control as much as possible.

[11] Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August, 1989) at 124.

C. Restricted Court Intervention

[19] Another fundamental principle underlying modern arbitration law is that court involvement or intervention in the arbitration process should be strictly limited. In many ways, this principle is a counterpart to the principle of party control. If parties choose to resolve their disputes privately outside the public court system, they should be left to that choice and not be subject to court intervention, except as needed to determine validity of the arbitration agreement or to ensure standards of basic procedural fairness for the arbitral process.

[20] Before the advent of modern arbitration statutes, courts enjoyed largely unfettered discretion about whether and when to intervene in arbitration. Courts were jealous about guarding their jurisdiction over legal dispute resolution and intervened frequently in arbitration. The arbitral process was treated as a separate, but not independent, system of justice in those days. "Judicial hostility to 'lesser' tribunals, and the lack of a modern legislative framework, inhibited the growth of arbitration in Canada . . . . Until the 1990's, commercial arbitration in Canada was not regarded as a real substitute for the courts . . . ."[12]

[21] One of the Alberta Act's main features is the statutory enshrinement of the fundamental principle of restricted court intervention.[13] Section 6 prohibits court intervention except for specified purposes as provided by the Act. This principle is further reflected in restricted court authority to refuse a stay of court proceedings under section 7 and to hear appeals under section 44. Section 45 delineates the very specific circumstances in which a party can apply to court to set aside an arbitral award. This statutory equivalent of judicial review addresses issues relating to jurisdiction, procedural fairness and fraud.[14] Court intervention is necessary to protect parties in those situations. Section 3 provides that parties cannot agree to vary or exclude that protection.

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[12] J Brian Casey & Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, New York: Juris Publishing, 2005) at para 1.1.

[13] ALRI Report at 64, 71-72.

[14] Jonnette Watson Hamilton, "Chapter Six: Arbitration" in Julie Macfarlane et al, eds; *Dispute Resolution: Readings and Case Studies*, 2d ed (Toronto: Edmond Montgomery Publications, 2003) 615 at 656, n 7 [*Dispute Resolution*].

[22] When basing its own Uniform Act on the principle of restricted court intervention, the ULCC stated:[15]

> The problem with the present domestic arbitration law is that the courts have broad discretion to intervene, and that these discretions leave undue latitude for intervention. That is why the proposals [for the Uniform Act] try to identify specific circumstances in which intervention is necessary in the interests of the parties, and to confer power to intervene only if those circumstances exist, and only to the extent called for by those circumstances.

[23] ALRI affirms the principle of restricted court intervention as a fundamental principle of the Alberta Act. Its importance should be re-emphasized and strengthened. Restricted court intervention is a necessary adjunct to the central principle of party control.

[24] Generally speaking, respondents to the ALRI RFD favoured continued restrictions on court intervention, although opinions were more mixed about new or tighter restrictions. However, as one respondent perceptively noted, arbitration is really a substitute for the parties' own ability to agree and is not simply based on a transference or denial of court power:

> . . . it is important to understand that the arbitration is based on the fact that the parties agreed to arbitrate issues on which they could not agree, and the resulting award is a substitute for matters on which they could have agreed. The arbitration is not based upon a transfer of jurisdiction from the courts to the arbitrator.

Therefore, restricting court intervention should not be viewed as a negative action but as a positive reinforcement of the principle of party control.

[25] Restricting court intervention in order to foster arbitration as a private process controlled by its parties, however, means that those parties must be prepared to forego court access except in the most egregious of cases. That is the nature of the trade-off. Nevertheless, as with the principle of party control, ALRI acknowledges that applying the principle of restricted court intervention must be balanced against the

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[15] Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August 1989) at 125.

principle of equal and fair treatment. Where the validity of the arbitration agreement is at issue or where a strong public policy concern exists about fairness, there should continue to be access to the courts.

RECOMMENDATION 2

Reform of the Alberta Act should respect the fundamental principle of restricted court intervention as much as possible.

CHAPTER 3

Stay Issues

A. Staying Court Proceedings in Arbitration Cases

1. THE PRIMACY OF ARBITRATION UNDER SECTION 7(1) AND 7(2)

[26] If a party to an arbitration agreement commences a court proceeding regarding a dispute covered by that agreement, the Alberta Act is designed to force that party to honour the agreement to arbitrate, except in very limited and specified circumstances. Section 7 provides:

> **Stay**
>
> **7(1)** If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
>
> **(2)** The court may refuse to stay the proceeding in only the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
>
> (d) the application to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.
>
> **(3)** An arbitration of the matter in dispute may be commenced or continued while the application is before the court.
>
> **(4)** If the court refuses to stay the proceeding,
>
> (a) no arbitration of the matter in dispute shall be commenced, and

> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.
>
> **(5)** The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
>
> (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
>
> (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.
>
> **(6)** There is no appeal from the court's decision under this section.

[27] Under section 7(1), the court has a mandatory statutory obligation to stay the court proceedings, thus allowing the arbitration process to prevail. Only if one of the very limited grounds in section 7(2) exists can the court refuse to stay the litigation.

[28] While section 7 is designed to enforce agreements to arbitrate, it is deliberately drafted in an indirect way for conceptual reasons. Chapter 2 noted that the law of arbitration rests on the principle of party control. As a private dispute resolution process, arbitration exists entirely outside the court system and occurs only by agreement of the parties. No one can be compelled by a court to arbitrate without their consent or prior agreement.[16] Yet, at common law in the absence of statute, even parties who have consented or agreed to arbitrate remain equally free to litigate. The courts' jurisdiction over disputes cannot be ousted by a private agreement between people. Such a contractual provision is illegal and void as against public policy. So, at common law in the absence of statute, parties to an arbitration agreement could still bring a court action and the court must exercise its jurisdiction to hear it.[17]

[29] A statutory provision is required to authorize or direct a court to refuse to exercise its jurisdiction. This is what section 7 does. Staying the

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[16] *Commercial Arbitration in Canada*, para 2:100.10.

[17] *Commercial Arbitration in Canada*, para 3:40.10.10.

action and refusing access to court proceedings does not cause a court to breach the principle of party control. It has not ordered or compelled the parties to arbitrate. They are simply left with no other option except arbitration if they want to resolve the dispute.[18] "Traditionally it has been said that courts will not order specific performance of arbitration agreements, in the sense that they will not order parties to proceed to arbitration. Courts do not compel arbitration; enforcement is negative in that they stay the court proceedings in specified circumstances."[19]

[30] This is also why section 7 never states directly or overtly that a court is authorized to stay an arbitration. If the court refuses to stay the litigation, section 7(4) simply provides that an arbitration shall not be commenced or continued. The arbitration is halted by operation of the statute, not by order of the court.

[31] The indirect language of section 7, conceptually necessary though it may be, contributes to the difficulty of interpreting what section 7 does and does not authorize a court to do.

2. PARTIAL STAYS UNDER SECTION 7(5)

[32] Section 7(5) allows the court to provide a partial stay of court proceedings in some circumstances, so that certain issues will be arbitrated and others will be litigated. If there are issues in dispute which are not covered by the arbitration agreement, the court may allow those issues to be litigated if it is reasonable to separate them from the arbitrable issues. In such a situation, the court can order a partial stay of the litigation so that the arbitrable issues will proceed to arbitration and the other remaining issues will be litigated.

[33] The distinction which section 7(5) requires to be made between matters in dispute is hard enough when it is only the arbitration parties who are involved in the competing litigation. Adding additional parties to the court proceedings makes the situation even more difficult. Those new parties are not subject to the arbitration agreement at all and so issues involving them cannot be arbitrated. Litigation is the only way to decide their liability.

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[18] *Commercial Arbitration in Canada*, para 3:40.10.10.

[19] *Commercial Arbitration in Canada*, para 3:40.10.10. The seminal case in this area is *Doleman & Sons v Ossett Corp*, [1912] 3 KB 257 at 268-70 (CA).

[34] Section 7(5) was not contained in the 1988 ALRI Report on which the Alberta Act is largely based. It appears to have originated in the Uniform Law Conference of Canada's 1989-90 *Uniform Arbitration Act*. Unfortunately the ULCC materials do not discuss or even mention section 7(5)'s intended purpose, meaning or effect.[20] The provision is also present in the arbitration statutes of those provinces which have implemented the Uniform Act.[21] Section 7(5) was added during the legislative process to the implementation bill which became the 1991 Alberta Act.

3. THE PROBLEM

[35] A partial stay under section 7(5) only works when it is reasonable to separate the matters in dispute, which the section requires as a prerequisite.

[36] But what happens when litigable issues involving some or all of the parties cannot reasonably be separated from the arbitrable issues of the parties who are subject to arbitration? A real dilemma is created and the system breaks down. In this situation, any stay of proceedings against the arbitration parties can only be a *de facto* partial stay because not all the issues or parties are subject to the arbitration agreement. Yet here a *de facto* partial stay will eventually lead to a multiplicity of proceedings concerning the same issues in different settings, between different parties, with different decision-makers and with potential for contradictory decisions on facts, law or both.

[37] It is not clear from section 7 what should be done in this situation. Must arbitration prevail between the parties to the arbitration agreement even if it leads to a multiplicity of proceedings? Must section 7(1) and 7(2) take precedence as between the parties to the arbitration agreement and a stay of court proceedings be ordered against them, even if other parties proceed to litigate the same issues?

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[20] Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August, 1989) at 77-78, Appendix B; Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (August, 1990) at 36, Appendix A.

[21] *The Arbitration Act*, CCSM c A120, s 7(5) [Manitoba Act]; *Arbitration Act*, SNB 1992, c A-10.1, s 7(5) [New Brunswick Act]; *Commercial Arbitration Act*, SNS 1999, c 5, s 9(5) [Nova Scotia Act]; *Arbitration Act, 1991*, SO 1991, c 17, s 7(5) [Ontario Act] and *The Arbitration Act, 1992*, SS 1992, c A-24.1, s 8(5) [Saskatchewan Act]. Prince Edward Island enacted the Uniform Act 16 years ago but it remains unproclaimed: *Arbitration Act*, SPEI 1996, c 4, s 7(5) [PEI Act].

[38] Or, despite section 7(5)'s ostensible restriction to partial stays, can a court act under that provision to refuse to stay the litigation in its entirety? In other words, can the court prevent multiplicity of proceedings by using section 7(5) to override the arbitration agreement and send every party and every issue to litigation?

[39] Courts have responded to this dilemma in two ways. Some courts enforce the arbitration agreement regardless of consequences. Other courts override the arbitration agreement in favour of a single court proceeding for all issues and parties. The following sections of this Report explore these two approaches in more detail.

4. APPROACH #1: SECTION 7(1) AND 7(2) MUST GOVERN

[40] When some or all parties are involved with issues that are not reasonably separable, some courts nevertheless require the parties to the arbitration agreement to arbitrate their issues as agreed. The other issues and parties proceed to litigation (although litigation may be temporarily stayed pending completion of the arbitration). These courts give priority to their mandatory duty under section 7(1) to stay litigation where agreements to arbitrate exist. According to this approach, a court cannot ignore its statutory obligation simply because litigation might be fairer to the parties or because arbitration might cause some "tactical, juridical or financial disadvantage" to a party.[22] The presence of additional parties and possible multiplicity of proceedings are not exceptions listed in section 7(2) which allow a court to refuse a stay of litigation in regard to arbitrable issues.[23]

[41] A leading case supporting this approach is the 1992 Alberta Court of Appeal decision in *Kaverit Steel and Crane Ltd. v Kone Corp.*[24] The Court noted that in modern commercial disputes, the problem of multiple parties and proliferating litigation will often be present, but "the statute

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[22] *Engineered Transportation and Rigging Co v Babcock & Wilcox Industries Ltd*, [1997] OJ No 2312 at para 14 (Ct J (Gen Div)).

[23] W H Hurlburt, "A Note on Escape from Arbitration Clauses: Effect of the New Arbitration Act" (1992) 30 Alta L Rev 1361 at 1365 [Hurlburt Note].

[24] *Kaverit Steel and Crane Ltd v Kone Corp* (1992), 120 AR 346 (Alta CA), rev'g (1991), 119 AR 194 (Alta QB), leave to appeal refused [1992] SCR vii [*Kaverit Steel*].

commands that what may go to arbitration shall go. No convenience test limits references [to arbitration]."[25]

[42] However, subsequent Alberta cases often ignore or distinguish *Kaverit Steel* because it interpreted Alberta's International Act, not the domestic Alberta Act. Both statutes place a mandatory duty on courts to stay litigation where an arbitration agreement exists, but the International Act does not have a provision explicitly authorizing a partial stay of litigation like the Alberta Act does.

5. APPROACH #2: SECTION 7(5) CREATES INDEPENDENT JUDICIAL DISCRETION

[43] Other courts respond to the dilemma of additional parties and issues that are not reasonably separable by using section 7(5) to refuse to stay the court proceedings in regard to any issue or any party. Despite the arbitration agreement which binds some of the parties, courts sometimes allow litigation of all the issues between all the parties and essentially stay arbitration of any aspect. This result conflicts with the court's general obligation under section 7(1) to stay litigation between arbitration parties except in the specific situations listed in section 7(2). But it does prevent multiplicity of proceedings.

[44] How do courts justify essentially staying an arbitration in its entirety under section 7(5)?

[45] Although on its surface section 7(5) deals only with partial stays of court proceedings in certain circumstances, many courts have interpreted it as nevertheless creating an *independent* judicial discretion to deal directly with arbitral proceedings. Moreover, this independent discretion is neither limited by nor subservient to the mandatory stay of litigation under section 7(1) and the strictly limited exceptions of section 7(2). According to this reasoning, if a court cannot grant a partial stay of court proceedings under section 7(5) because the issues cannot be separated, the court's only alternative under that section is to refuse to stay any of the court proceedings, thereby effectively staying the arbitration.[26] This

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[25] *Kaverit Steel*, note 24 at para 8.

[26] *MacKay v Applied Microelectronics Inc*, 2001 NSSC 122 at paras 31-36; *Shaw Satellite GP v Pieckenhagen*, 2011 ONSC 4360 at paras 42-44; *Hammer Pizza Ltd v Domino's Pizza of Canada Ltd*, [1997] AJ No 67 at para 9 (QB).

approach was endorsed by the Ontario Court of Appeal in a 2007 decision called *Radewych v Brookfield Homes (Ontario) Ltd.*, in which the Court noted as well that a full stay of arbitration is also consistent with provincial judicature statutes giving courts a general power to prevent multiplicity of legal proceedings.[27]

[46] Section 6(c) of the Alberta Act can also play a procedural role in allowing a stay of arbitration to be sought on the basis that a multiplicity of legal proceedings would be a manifestly unfair or unequal treatment of the arbitration parties. Section 6 provides:

> **Court intervention limited**
>
> **6** No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

[47] The Alberta Court of Appeal pronounced this interpretation of section 6(c) in the 2004 case of *New Era Nutrition Inc. v Balance Bar Co.*[28] While a main purpose of the Alberta Act is to delineate and restrict court interference in arbitrations, the Court pointed to the presence of section 7(4) and 7(5) as an indication that the Legislature did not want multiplicity of proceedings to result. However, the Alberta Act does not explicitly allow anyone to apply for a stay of arbitration. A party to an arbitration agreement who wants to have all issues litigated must instead apply for a stay of that litigation under section 7 and then argue for rejection of his or her own application. The Court found this indirect method to be peculiar and disingenuous. It doubted that the Legislature intended that effect.

[48] The Court noted that sections 6(c), 7(4) and 7(5) were all added by the government and did not appear in the ALRI Report on which the

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[27] *Radewych v Brookfield Homes (Ontario) Ltd*, 2007 ONCA 721 at para 3 [*Radewych*]. In Alberta, see the *Judicature Act*, RSA 2000, c J-2, s 5(3)(f) and the *Alberta Rules of Court*, Alta Reg 124/2010, rr 1.3, 1.4(1), 1.4(2)(h).

[28] *New Era Nutrition Inc v Balance Bar Co*, 2004 ABCA 280 [*New Era*].

Alberta Act was based. They represent the government's rejection of ALRI's proposal to restrict court intervention only to those matters specifically listed in its version of section 7(2).[29] Taken together, all these factors mean that:[30]

> . . . the Legislature intended that the courts use subsection 6(c) to provide a remedy to cure unfairness arising from matters not covered by the specific language of the legislation. . . . [S]ubsection 6(c) allows a party, faced with both a statement of claim and a notice to arbitrate, to apply to stay the arbitration on the basis that the matters in the two proceedings overlap and cannot be reasonably separated.

[49] A recent Alberta case dealing with additional parties and issues that are not reasonably separable is *Lamb v AlanRidge Homes Ltd.*,[31] where the plaintiffs sued their home builder despite an arbitration clause in their contract, along with several subcontractors who were not parties to the main construction contract containing the arbitration clause. The plaintiffs claimed joint and several liability among the defendants for the principal deficiencies of the construction. The claim covered both tort and breach of contract.

[50] The Court of Queen's Bench stated that, if the only defendant in the litigation had been the builder AlanRidge Homes, the arbitration clause would prevail and the action would be stayed under section 7(1). But the presence of other defendants who were not subject to the arbitration process, together with the inseparability of the claims as between the builder and subcontractors, meant that AlanRidge Homes could not be granted a partial stay of the litigation under section 7(5). To do so would result in a multiplicity of proceedings. The Court distinguished *Kaverit Steel* and stayed the arbitration, citing the *New Era* and *Radewych* cases as authority for doing so.

[51] On appeal, the Alberta Court of Appeal held that it could not legally rule on this area of controversy because section 7(6) of the Alberta

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[29] Although the ALRI Report did not contain a recommendation for a partial stay, it is important to note that the Institute's draft Act did include court discretion to refuse a stay of litigation under its version of section 7(2) if the arbitration agreement did not bind all the parties to the dispute: see s 8(2)(a)(iv) at 75. However, there is no discussion in the Report of the basis for or implications of that provision.

[30] *New Era*, note 28 at para 43.

[31] *Lamb v AlanRidge Homes Ltd*, 2009 ABCA 343, aff'g 2009 ABQB 170 [*Lamb*].

Act provides there is no appeal of a court decision made under section 7. In *obiter* comments, however, the Court said that section 7 is "far from a model of clarity and, in particular, the intended scope of subsection (5) is far from clear. . . . [which] suggests that legislative review and amendment may be appropriate, especially in circumstances in which appellate review of decisions under section 7 is precluded."[32]

6. CRITICISM OF THE TWO APPROACHES

[52] Advocates of applying section 7(1) and 7(2) argue that section 7(5) of the Alberta Act should not be interpreted so as to defeat arbitration agreements because that undermines the purpose of the entire Act. If courts do not stay litigation so that parties must honour their agreements to arbitrate, the value and utility of such agreements will be lost. Any clever counsel could subvert an arbitration agreement by thinking up additional issues and adding additional parties to a claim.[33] Agreements to arbitrate would not be worth the paper on which they are written.

[53] Advocates of an independent judicial discretion under section 7(5) argue that it prevents the greater evil of multiplicity of proceedings. Their opponents' approach simply creates unnecessary expense, contradictory decisions and uncertain results, all in the name of conceptual purity.

[54] Clarifying section 7 involves deciding which of these two case law approaches should prevail in the Alberta Act.

7. CONSULTATION FEEDBACK

[55] Consultation feedback from the ALRI RFD almost exclusively supported the strict application of section 7(1) and 7(2), rejecting any notion of independent judicial discretion under section 7(5). According to these respondents, courts must uphold the purpose of the Alberta Act and automatically stay any attempt by an arbitration party to litigate arbitrable issues in the courts even where they are intertwined with other issues or parties. Enforcing this primary policy value would bring a "heightened level of certainty and clarity" to the arbitration process, said one

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[32] *Lamb* (CA), note 31 at paras 16, 18.

[33] Hurlburt Note, note 23 at 1367; *Commercial Arbitration in Canada* at para 3:40.90.60. Of course, if additional parties are clearly unconnected to the claim, a court can remove them by amending or striking out the deficient pleadings: *Alberta Rules of Court*, Alta Reg 124/2010, r 3.68.

respondent. Agreements to arbitrate must be enforced even if doing so might lead to a multiplicity of proceedings. Another respondent stated that parties "who agree to arbitrate do so with the knowledge that this could lead to a multiplicity of proceedings." They do not need to be "protected" from that situation:

> Non-parties to the arbitration agreement can continue to proceed in court although there may be times when a court hearing is best stayed pending the outcome of the arbitration .... Should the matters be sufficiently intertwined and are best addressed in court, the parties to the arbitration agreement have the option of foregoing their right to arbitrate and attorning to court jurisdiction – but that should be *their* choice to make and agree upon. [emphasis added]

In other words, a court should not make that decision for them by interpreting section 7(5) in such a way as to create an independent judicial discretion to intervene and stay the arbitration.

8. RECOMMENDATION FOR REFORM

[56] ALRI advocates the primacy of section 7(1) and 7(2) in this area and rejects the view that section 7(5) creates an independent judicial discretion to stay arbitrations. Such an interpretation of section 7(5) undermines the purpose and effectiveness of the Alberta Act. For all the reasons expressed in Chapter 2, ALRI would strictly apply the fundamental principle of party control in this regard. Agreements to arbitrate must be enforced. Any arbitrable issues must be arbitrated between the arbitration parties. There is no judicial discretion in section 7(1) to refuse a stay of legal proceedings except in the very limited circumstances legislated in section 7(2). There is, and should be, no independent judicial discretion in section 7(5) to undermine that result or to stay an arbitration. Creating or granting court discretion in this area contradicts the fundamental principle of restricting court intervention in arbitration.

[57] While multiplicity of proceedings can cause some practical difficulties, that factor cannot be allowed to trump the fundamental principles of party control and restricted court intervention on which the Alberta Act is based. Arbitration parties who enjoy the benefits of those principles must bear their burdens as well. If parties choose to use arbitration, they must recognize that in certain situations some degree of multiplicity of proceedings may result. More attention to, and better

drafting of, arbitration provisions could assist in alleviating some problems. However, the two-edged sword of party control means that arbitrating parties must live with the consequences of their drafting, good or bad.

[58] To clarify the primacy of section 7(1) and 7(2), ALRI recommends that section 7(5) be repealed. Its absence from the legislation will also negate the interpretation placed on section 6(c) by *New Era* on which *Lamb* relied, further clarifying that multiplicity of proceedings cannot defeat the fundamental statutory principles of party control and restricted court intervention in arbitration.

RECOMMENDATION 3

Section 7(5) of the Alberta Act should be repealed.

B. Other Issues Raised in the ALRI RFD

[59] The ALRI RFD explored some alternative approaches and solutions to aspects of certain issues. In light of ALRI's main recommendation to repeal section 7(5), those issues are disposed of as follows.

1. ASSESSING WHETHER ISSUES CAN BE REASONABLY SEPARATED

[60] The ALRI RFD noted that a partial stay under section 7(5) works well if it is reasonable to separate the matters in dispute, which the section indeed requires as a prerequisite. The Alberta Act does not provide a test or list of factors to help assess whether it is reasonable to separate issues. Nor do courts often discuss in detail the basis for such decisions.

[61] ALRI sought input concerning whether a statutory test or list of factors would be useful in applying section 7(5). Given our recommendation to repeal section 7(5), this issue is now redundant. In any event, consultation feedback about this idea was uniformly negative, stating that crafting an effective or comprehensive test or list would either be arbitrary or impossible.

2. COMPROMISING THE PRINCIPLE OF PARTY CONTROL

[62] The ALRI RFD also explored whether multiplicity of proceedings could be lessened in some situations by interfering with the principle of party control in order to promote arbitration.

[63] If a party to an arbitration agreement sues only the other party to the arbitration agreement and the litigation raises additional issues that cannot reasonably be separated from the arbitrable issues, should a court be statutorily authorized to fully stay the litigation and send everything to arbitration? This breaches the principle of party control by extending the reach of the arbitration agreement beyond the issues to which the parties originally agreed, but could it not be justified in order to ensure a single decision-maker and to promote arbitration?

[64] Given ALRI's reaffirmation of the central importance of the principle of party control in this area, this inconsistent approach would not be desirable now as a reform option even if it advances the use of arbitration.

3. DIFFERENT RULES FOR DIFFERENT PARTIES

a. Differentiating Between Types of Arbitration

[65] In balancing these difficult questions about when to honour arbitration agreements and when to allow access to the courts, the ALRI RFD asked whether it would be helpful if the Alberta Act distinguished between parties who are engaged in commercial arbitration and parties who are engaged in other types of arbitration.

[66] Other types of arbitration in Alberta include those arising out of consumer transactions which do not involve an unfair practice under the *Fair Trading Act*,[34] new home warranty disputes and other issues between

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[34] The *Fair Trading Act*, RSA 2000, c F-2, ss 13-19 creates a statutory civil action to deal with unfair practices in a consumer transaction. Section 16 allows arbitration clauses in consumer contracts to prevail over the statutory civil action only if the written arbitration agreement was approved by the Minister. This provision is aimed at contracts of adhesion where the consumer has no opportunity to negotiate but must simply agree to a standard contract with an arbitration clause in order to buy the desired goods or services. Lack of ministerial approval under s 16 prevents a contract of adhesion from blocking consumer access to the courts by individual or class action: *Young v National Money Mart Co*, 2013 ABCA 264, aff'g (*sub nom Young v Dollar Financial Group Inc*) 2012 ABQB 601. See also Jonette Watson Hamilton, "Enforcing Alberta's Restrictions on Consumer Arbitration" (6 August 2013), online: University of Calgary Faculty of Law, ABlawg <http://ablawg.ca/2013/08/06/enforcing-albertas-restrictions-on-consumer-arbitration/>.

home builders and consumers, family disputes around issues like matrimonial property, membership disputes within not-for-profit community organizations, etc.

[67] The assumption is often made that commercial parties are relatively equal in business expertise, bargaining power and sophistication. If it is fair to make that assumption, then should stricter rules be applied to commercial parties? The ALRI RFD asked whether a court should be more adamant in forcing commercial parties to honour their agreements to arbitrate, as is done in international commercial arbitration. A case might be made that the values of section 7(1) and 7(2) should predominate where commercial parties are concerned.

[68] By contrast, the general assumption regarding parties engaged in consumer, family and other types of arbitration is that greater power and expertise imbalances often exist between them. If it is fair to make that assumption, should a different set of rules be applied to such arbitration? The ALRI RFD inquired whether a court should have a greater independent discretion here to directly stay arbitration in complex cases of additional parties and issues that are not reasonably separable, so that litigation of all issues will proceed and multiplicity of proceedings will be prevented.

[69] Consultation feedback was mixed fairly evenly on this idea, with some respondents in favour and others opposed. Some respondents particularly liked the idea of having a separate provincial statute for commercial arbitration. However, at least one respondent noted the difficulty of legally distinguishing between commercial and consumer matters and stated that, if consumers need special protection concerning arbitration, it is better to do that in consumer legislation. Another respondent said it is unfair to assume that all parties in a commercial context are equally sophisticated. For example, large corporate general contractors and sub-sub-sub-contractors may not be on a level playing field.

[70] Most arbitration statutes are general in nature and apply to any arbitrations governed by them. Rarely are different rules specified for different types of arbitration. However, Ontario and British Columbia do modify their arbitration provisions to a lesser or greater extent for family

law disputes. The Ontario Act specifies that the substance of family arbitrations is governed by that province's family law legislation.[35] While the Ontario Act's appeal provisions are the same for all arbitrations, family arbitration appeals will go to the Family Court.[36] The major substantive difference in the statutory rules governing family arbitrations is that such parties (unlike other arbitration parties) cannot contract out of the laws of Ontario or Canada, and cannot contract out of the appeal provisions.[37] These specialized rules were enacted in 2006 to prevent family arbitration from being used as a means to circumvent Ontario family law protection by deciding rights according to Sharia law.[38]

[71] British Columbia recently proclaimed significant amendments to its *Arbitration Act* arising out of a decade-long comprehensive review and reform of its family law legislation.[39] A main thrust of that family law reform is to facilitate and encourage increased use of non-court dispute resolution methods, including family law arbitration which previously was not a widely employed option in that province.[40] The BC Act now contains some explicitly different rules for family law arbitration than for other types of arbitration, including:

- Arbitrations and arbitral awards respecting family law disputes must be dealt with according to the law and requirements set out in the BC Family Law Act (for example, deciding certain issues in the best interest of the child).[41]
- Unlike other arbitration agreements, an arbitration agreement respecting a family law dispute can generally be made only *after* the dispute has arisen. No prior agreements for dispute resolution are

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[35] *Arbitration Act, 1991*, SO 1991, c 17, s 2.1 [Ontario Act].

[36] Ontario Act, s 45(6).

[37] Ontario Act, s 3, item 2.

[38] Heather M MacNaughton & Jessica Connell, "A Delicate Balance: The Challenges Faced by Our Democratic Institutions in Reconciling the Competing Rights and Interests of a Diverse Population" (2011) 44 UBC L Rev 149 at 153-154.

[39] *Arbitration Act*, RSBC 1996, c 55 [BC Act], as amended by *Family Law Act*, SBC 2011, c 25 [BC Family Law Act].

[40] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010) at 12 and 18, online: <http://www.ag.gov.bc.ca/legislation/family-relations-act/pdf/Family-Law-White-Paper.pdf>.

[41] BC Act, ss 2(2.1), 23(2), 30(4).

enforceable.[42] This prevents parties from signing away their right to litigate until the relationship has broken down.

- Safeguards are enacted to protect vulnerable parties who may be in a power imbalance situation. A court acting under the BC Family Law Act can set aside or replace an arbitration agreement or an arbitral award in such situations.[43]

- There is a special, more generous appeal provision for family law arbitration. Without leave, a party can appeal on a question of law or on a question of mixed fact and law. While other arbitration parties can agree to exclude any court appeal, family law parties cannot. The appeal route must remain available. [44]

[72] In addition, the BC Family Law Act now defines lawyers and arbitrators as being "family dispute resolution professionals" on whom a statutory duty is placed to assess in accordance with the regulations whether family violence is present and the extent to which it might adversely affect a party's safety or ability to negotiate a fair agreement. A family dispute resolution professional must also advise parties of all facilities and other resources for resolving the dispute and must discuss the advisability of using various types of family dispute resolution.[45]

[73] In considering reform of the Alberta Act, ALRI is sympathetic to the idea that special treatment and protection due to potential power imbalances may be needed for family and consumer arbitration. These situations may warrant modifying a strict adherence to the fundamental principle of party control over arbitration. Family violence of various kinds could well affect how parties exercise their rights and choices in the arbitral process. The use of contracts of adhesion in consumer situations does prevent any meaningful consumer participation in negotiating the terms of an arbitration agreement.

[74] However, ALRI questions whether any special treatment or protections would best be enacted in a general arbitration statute like the Alberta Act. Such legislation is largely designed to apply only by default

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[42] BC Act, s 2.1(1)-(2).

[43] BC Act, s 2.1(3)-(4).

[44] BC Act, ss 31(3.1) and 35(2).

[45] BC Family Law Act, note 39, ss 1 and 8.

when the parties themselves have not otherwise provided for different procedural rights and practices in the arbitration agreement. It enshrines a central role for the principle of party control. Accordingly, ALRI believes that such legislation should remain as general as possible to fulfill that default function.

[75] Where specialized, mandatory arbitration provisions are needed for self-contained areas of law, ALRI believes that they should be contained in specialized legislation dealing with that legal area. A good example is labour arbitration, which is not governed by the Alberta Act but is instead governed by a number of specialized statutes explicitly exempted from the Alberta Act's operation.[46]

[76] If legislative protection and special treatment of family or consumer arbitration is warranted, it should be enacted where required in the *Family Law Act*, *Matrimonial Property Act*, *Fair Trading Act* or other specific statutes. The extent to which such special protection might be needed and the detailed forms it should take are issues which far exceed the narrow and specific boundaries of our current project. Full and proper treatment of these issues would both require and deserve their own in-depth projects and extensive consultation with Albertans.

[77] For the purposes of this Report, it is sufficient to simply note that ALRI does not recommend enacting different rules for different parties in the Alberta Act.

b. Differentiating Between Types of Arbitration Agreements

[78] Alternatively, rather than differentiating between types of arbitration, the ALRI RFD suggested that another way to apply different rules to different situations might be to examine the terms of each agreement to arbitrate. If the parties consciously crafted deliberate parameters for their arbitration, should the values of section 7(1) and 7(2) predominate to ensure stricter application of that agreement to arbitrate? If, however, the parties did not put that kind of conscious effort into drafting their individual arbitration agreement and instead just used a standard form or boilerplate clause, then should the court exercise an

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[46] Alberta Act, s 2(3).

independent judicial discretion in deciding whether litigation must be stayed when additional parties and issues are involved?

[79] Consultation feedback on this idea was universally negative. All agreed that trying to distinguish between arbitration clauses in this way would lead to inevitable disputes. One respondent noted that such disputes would require "evidence of negotiations to prove the true intent of the parties. This undermines the very basis of contract interpretation, which presumes parties to have intended the words that they used." Another respondent stated:

> I don't know how the Act or a Court could really define or determine which arbitration clauses have "consciously created parameters" and which are "standard form" or "boiler plate". Many quite brief arbitration clauses are very carefully crafted, for example those of many of the arbitration institutions, whereas more lengthy individually-crafted arbitration clauses can sometimes be unclear, ambiguous or verging on the pathological.

[80] ALRI accepts this feedback and, for all the reasons previously stated, does not recommend altering the Alberta Act's general orientation in order to create different rules for different parties on this basis.

C. Other Issues Raised in the Consultation Feedback

[81] The open-ended approach of the ALRI RFD invited suggestions from respondents about other possible issues and solutions in these areas. ALRI carefully considered each suggestion.

1. REFUSAL OF STAY UNDER SECTION 7(2)(e)'S EXCEPTION FOR DEFAULT OR SUMMARY JUDGMENT

[82] Under the Alberta Act, section 7(2)(e) provides that one exception to section 7(1)'s mandatory stay of court proceedings is where "the matter in dispute is a proper one for default or summary judgment." A respondent suggested that:

> [S]ection 7(2)(e) should also be repealed. The parties have made a binding agreement to arbitrate the dispute, it should be left within the jurisdiction of the arbitral tribunal to determine whether the case is a proper one for default or summary judgment.

[83] This exception is a standard provision in modern Canadian arbitration statutes.[47] Only the BC Act omits it.[48] The BC Act's exceptions ("arbitration agreement is void, inoperative or incapable of being performed") are modeled on the UK Act instead.[49] Domestic arbitration agreements in England are also subject to a further exception: "other sufficient grounds for not requiring the parties to abide by the arbitration agreement."[50]

[84] ALRI agrees with the respondent's assertion. All the other exceptions under section 7(2) involve the invalidity of the arbitration agreement or the applicant's lack of good faith as evidenced by delay. These exceptions represent fundamental procedural or substantive flaws which justify allowing litigation to prevail over the arbitration agreement. It is not an equally serious justification for overriding the parties' valid agreement to arbitrate simply because the competing litigation is amenable to default or summary judgment. Applying the principle of party control consistently in the Alberta Act means that a court in these circumstances should stay the competing litigation under section 7(1). If a party who has agreed to arbitrate has instead absconded or refuses to participate, the arbitral award should be made accordingly in that party's absence and then enforced like any other arbitral award. Similarly, if there are no disputed material facts at issue in an arbitration, the arbitral award should be made summarily and also enforced like any other arbitral award.

RECOMMENDATION 4

Section 7(2)(e) of the Alberta Act should be repealed.

2. INABILITY TO APPEAL A COURT OF QUEEN'S BENCH STAY DECISION

[85] Section 7(6) of the Alberta Act provides that a Court of Queen's Bench decision under section 7 cannot be appealed to the Court of Appeal.

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[47] *Uniform Arbitration Act* (1990), s 7(2)(e), online: Uniform Law Conference of Canada <http://www.ulcc.ca/images/stories/Uniform_Acts_EN/Arbitrat_En.pdf> [Uniform Act]; Manitoba Act, note 21, s 7(2)(e); New Brunswick Act, note 21, s 7(2)(e); Nova Scotia Act, note 21, s 9(2)(e); Ontario Act, s 7(2), item 5; Saskatchewan Act, note 21 s 8(2)(e). The unproclaimed PEI Act, note 21, also contains it in s 7(2)(e).

[48] BC Act, s 15(2).

[49] *Arbitration Act 1996* (UK), c 23, s 9(4) [UK Act].

[50] UK Act, s 86(2).

Case law modifies this absolute prohibition, however, by providing that an appeal is not barred where a stay is refused because the arbitration agreement is held to be invalid or otherwise inapplicable.[51] If the appellate court reaches the contrary decision and holds that the arbitration agreement is indeed valid and applicable, the case will then be remitted to the lower court to decide the stay application. That stay decision cannot then be appealed.

[86] A respondent proposed that section 7(6) be amended to allow an appeal, with leave, of any stay decision. The respondent submitted that this would allow the Court of Appeal "to clarify legal differences arising amongst Queen's Bench judges, without the need for legislative reform."

[87] No modern Canadian arbitration statute provides for an appeal of a stay decision.[52] As well, the UK Act is silent on this matter concerning both international and domestic arbitrations. The policy in this area uniformly curtails appeals in the interest of finality and preventing delay in the arbitral process. The Supreme Court of Canada would more than likely respect this policy as well.

[88] ALRI does not support broadening section 7(6) to provide a general ability to appeal stay decisions. We believe the better approach is to repeal section 7(5) and clarify the court's mandatory duty to stay competing litigation, as we have recommended.

3. CONDUCT OF FAMILY LAW MEDIATION AND ARBITRATION BY NON-LAWYERS

[89] A family law lawyer expressed concern to ALRI that the use of mediation and arbitration in family law by non-lawyers is growing. This respondent asserted that "[o]verall, there seems to be a general lack of understanding and training about arbitration and the issues involved." The respondent's other concerns are summarized as follows. Child

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[51] *A G Clark Holdings Ltd v HOOPP Realty Inc*, 2013 ABCA 101 at paras 6-14. The Alberta Court of Appeal followed similar decisions by the appellate courts of Ontario, Manitoba and New Brunswick.

[52] These provisions are all explicit prohibitions, with the exception of the BC Act. It defines "court" as the Supreme Court and is silent about appeals from applications made to the Supreme Court except under s 34 concerning applications to court to determine a question of law. Section 34(3) explicitly provides that such a determination can be appealed to the Court of Appeal. The implication from the drafting style is that nothing else would be appealable.

psychologists often generate the draft arbitration agreement in Parenting Coordination cases and frequently ask parties to sign these agreements without legal advice. Moreover, Parenting Coordinators may inadvertently exceed their authority beyond the scope of the arbitration agreement. The whole situation is complicated where the underlying cause of the conflict stems from emotional or mental health issues.

[90] If a comprehensive review is undertaken to reform the role and use of arbitration in family law, issues such as these should be examined. In ALRI's opinion, resolution of these issues may be more a matter of proper training and mobilization of resources than matters which are amenable to a strictly legislative solution.

4. ARBITRATION AND BUILDERS' LIENS

[91] The *Builders' Lien Act* requires that lienholders must commence legal proceedings to enforce a lien.[53] Section 5 provides that "[a]n agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void." However, the Alberta Court of Appeal has held that this does not preclude the use of arbitration to determine the quantum of the lien.[54] Once commenced, the legal proceedings can be stayed, arbitration can proceed to determine quantum, and then court proceedings will resume to enable enforcement of that amount.

[92] The authors of *Construction Law in Canada* have noted that this combination of legal proceedings and arbitration "would seem to incorporate the best of all worlds. However, proceeding in this fashion is a very rare exception rather than the rule in construction disputes."[55] They identify multiplicity of parties in construction disputes as the main problem.[56]

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[53] *Builders' Lien Act*, RSA 2000, c B-7, s 49.

[54] *Kvaerner Enviropower Inc v Tanar Industries Ltd* (1994) 24 Alta LR (3d) 365 (CA). See also W Donald Goodfellow, "Arbitration Under the *Builders' Lien Act* – Do They Work or Merely an Added Expense" (paper delivered at Legal Education Society of Alberta Seminar: *Builders' Liens and Related Construction Law Issues*, October 2002) at 1-2.

[55] The Honourable Mr Justice Leonard Ricchetti & Timothy J Murphy, *Construction Law in Canada* (Markham, Ont: LexisNexis Canada, 2010) at 244 [*Construction Law in Canada*].

[56] *Construction Law in Canada* at 244-245.

[93] Respondents familiar with construction law confirmed the overlap between builders' liens and arbitration. One respondent noted that multiplicity of proceedings is inevitable in this context. Sometimes it is a hardship for a party to pay money into court in order to stay the lien proceedings while arbitration occurs. Duplicate information must often be provided in both the arbitration and the lien proceeding.

[94] ALRI does not believe that any additional or special reform action is required in the area of arbitration as it relates to builders' liens. In any event, however, the proper place for special rules would be the *Builders' Lien Act*, not the Alberta Act.

5. ADDING RELATED NON-SIGNATORIES TO THE ARBITRATION

[95] A respondent stated that, while unrelated persons who have not agreed to arbitrate should never be forced to join an arbitration, it should be possible to force a related subsidiary or parent corporation of a commercial arbitration party to join an arbitration.

[96] There is a great deal of American case law on this point, the gist of which is that legal interrelationships between corporations can produce imputed consent by a corporation to an arbitration agreement of which it is otherwise a non-signatory. Imputing consent means that joining such parties does not undermine the fundamental principle of party control and consent in arbitration law.[57] ALRI is of the opinion that such imputation is not easily amenable to legislative codification and is best left to the courts to determine. Should this issue come to the forefront in our country, Canadian courts can resort to the wealth of American case law in this complex area.

6. THE COURT'S CONSOLIDATION POWERS UNDER SECTION 8

[97] As a solution to some multi-party dilemmas, a respondent organization proposed amending section 8 of the Alberta Act which deals with consolidation of arbitrations. However, the organization was not unanimous in this matter and a dissenting submission was also received

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[57] See James M Hosking, "Non-Signatories and International Arbitration in the United States: The Quest for Consent" (2004) 20:3 Arb Int'l 289; Carl F Ingwalson, Jr, Adam T Mow & Elysian Kurnik, "Arbitration and Nonsignatories: Bound or Not Bound?" (2012) 6:1 Journal of the ACCL 73.

from one of its members. The main points of the respondent organization's submission are as follows.

[98] Typically in construction matters, there will be a series of different contracts between different parties but all relating to the same building project: one agreement between the owner and the general contractor, another between the general contractor and architect or engineering firm, and yet others between contractors and sub-contractors. Usually these contracts have arbitration clauses binding the parties to that particular contract.

[99] When problems arise, the owner (especially) would like to have a single proceeding to resolve the interrelated issues. However, as the respondent organization pointed out:

> There is case authority in Canada that even if there is a mandatory arbitration clause in the prime contract between the owner and the contractor, the subcontractor whose work and materials may very well be the cause of the dispute between the owner and the contractor, cannot be forced to be a party to the mandatory arbitration clause without there being a specific clause in the subcontract obligating the subcontractor to participate in and be bound and be liable for its actions in the arbitration, even if the subcontract indicates that all the terms and conditions of the prime contract are incorporated into the subcontract. . . .
>
> It is clear from the Canadian cases that it takes very clear and specific language to require the subcontractor to be a party and participate in the mandatory arbitration proceedings taking place between the owner and the contractor.

[100] An arbitrator does not have the power to order a consolidation of all these different arbitrations into a single proceeding. Nor does a court. There is a consolidation provision in section 8 of the Alberta Act but, in deference to the fundamental principle of party control which holds that no one can be forced to arbitrate against their will, it basically requires consent or agreement by the non-privy party or parties before the court will order consolidation:

> **Powers of Court**
>
> **8(4)** On the application of all the parties to more than one arbitration, the court may order, on terms that it considers just,

> (a) that the arbitrations be consolidated,
>
> (b) that the arbitrations be conducted simultaneously or consecutively, or
>
> (c) that any of the arbitrations be stayed until any of the others are completed.
>
> **(5)** When the court orders that arbitrations be consolidated, it may appoint an arbitral tribunal for the consolidated arbitration, and if all the parties agree as to the choice of the arbitral tribunal, the court shall appoint that arbitral tribunal.
>
> **(6)** Subsection (4) does not prevent the parties to more than one arbitration from agreeing to consolidate the arbitrations and doing everything necessary to effect the consolidation.

[101] Alberta's provision is the standard one in arbitration statutes, including those governing international arbitration.[58] The respondent organization proposes that section 8 be amended to allow a court to order consolidation of two or more arbitrations regardless of the parties' consent if "the arbitrations deal with the same subject-matter or are interrelated to such a degree to satisfy the Court that there would be a duplicity of proceedings without such consolidation of arbitrations." Further, even if there is no arbitration clause at all in a contract between sub-parties but there is one in the main contract between the owner and the contractor, the court should still be able to compel all the parties to participate in the arbitration and be bound by its results.

[102] Clearly this proposal advocates a decisive legislative override of the principle of party control in this area. The dissenting respondent stated that, in order to preserve that principle, this situation is instead best handled by careful legal drafting of the various contracts:

> . . . the owner [should require] . . . (perhaps in the bid documents and certainly in the prime contract) that everyone involved in the project, including the consultant, the contractor and all subcontractors and suppliers agree to arbitration and to a joinder to existing arbitration if it touches on their contract/work, and to consolidation if the issues arise

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[58] Broader consolidation powers are sometimes found in the rules of arbitration centres (see International Chamber of Commerce, *Arbitration and ADR Rules*, Paris: ICC, 2012, art 7; The London Court of International Arbitration, *Arbitration Rules*, London: LCIA, 1998, r 22.1(h)), but they still operate consensually in the sense that the arbitration parties must agree to arbitrate by those Rules in the first place.

> from or touch their contract/work. There could even be a provision for damages for any party who fails to include such a provision in its subcontracts. I prefer the freedom of contract over the imposition of results by legislation.

[103] For all the reasons expressed in Chapter 2, ALRI is of the opinion that the fundamental principle of party control must continue to govern in this area. Careful drafting of the series of arbitration contracts governing the various parties and tasks involved in the same project can create by consent the joinder structure necessary to hear all matters in a single arbitration involving all relevant parties. Rather than overriding one of the fundamental conceptual bases of arbitration law in order to create a legislative "quick fix," greater emphasis should be placed on better continuing professional education of lawyers regarding how to draft such arbitration agreements. ALRI is supported in this conclusion by the following discussion of the problem in *Construction Law in Canada* in which the suggested solution is practice-based, not a call for legislative amendment:[59]

> Perhaps the most significant problem [leading to cases being litigated rather than arbitrated] is that many construction disputes involve many parties. It does not mean that there cannot be one consolidated arbitration or that it cannot be heard consecutively. However, it generally means that one needs the consent of all parties or carefully worded contracts down the chain from the owner to the subcontractors. This problem is being overcome as a result of more contracts having "joint arbitration provisions". This obligates the "subcontractor" to be part of the owner/contractor arbitration if it involves the subcontractor's work. This allows the arbitration process to do the same as the litigation that typically results in one trial before one judge, who decides all issues relating to the construction project.

[104] This situation highlights the double-edged nature of the principle of party control. As stated previously in Chapter 2, arbitrating parties should not insist on party control when it benefits them but expect the statute or courts to step in and fix problems stemming from poorly prepared arbitration agreements over which the parties exercised full control.

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[59] *Construction Law in Canada* at 245 [footnote omitted].

[105] ALRI is also supported in this conclusion by the Uniform Law Conference of Canada's recent review of its *Uniform International Commercial Arbitration Act*. The ULCC did not recommend changing the Act's current requirement for all-party consent to consolidation. Following consultation on this issue, it was determined that such a change "is not feasible or advisable".[60]

7. INCORPORATING BY REFERENCE ANOTHER AGREEMENT'S ARBITRATION CLAUSE

[106] A respondent organization advocated amending the Act "to fix the problem of specific words being required to incorporate arbitration provisions of a contract by reference in subcontracts. Any indication that the parties intended the provisions of another contract to be incorporated should be enough without specific mention of arbitration."

[107] Relying on English precedent, the 1996 Ontario case of *Dynatec Mining Limited v PCL Civil Constructors (Canada) Inc* held that "[i]ncorporation of an arbitration clause can only be accomplished by distinct and specific words . . . ."[61] The standard law of construction of contracts governs whether provisions in a principal contract are incorporated by reference into a subcontract. The intention of the parties is the central issue, so distinct and specific words of incorporation in the subcontract are the best evidence of that intention. Courts are especially vigilant about the incorporation of arbitration clauses because those provisions remove a party's right of access to the courts.[62]

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[60] Uniform Law Conference of Canada, *International Commercial Arbitration: Report and Commentary of the Working Group on New Uniform Arbitration Legislation* (August 2013) at para 80 [unpublished]. The new *Uniform International Commercial Arbitration Act* based on this Report was adopted by the ULCC at its 95th Annual Meeting in August 2013, subject to the receipt of two or more objections from jurisdictional representatives by November 30, 2013 [Meeting Proceedings as yet unpublished]. The ULCC did recommend that, if all parties agree to consolidate but a party subsequently refuses to follow through, the other parties may apply to court to consolidate the arbitrations in order to enforce that agreement. Moreover, the court should be empowered to assist the parties with any procedural steps necessary to carry out a consolidated arbitration (for example, by appointing the arbitral tribunal if the parties cannot agree on its composition): Uniform Law Conference of Canada, *International Commercial Arbitration: Report and Commentary of the Working Group on New Uniform Arbitration Legislation* (August 2013) at paras 80-81 [unpublished].

[61] *Dynatec Mining Ltd v PCL Civil Constructors (Canada) Inc*, [1996] OJ No 29 at para 10 (Ont CJ Gen Div) [*Dynatec*] [footnotes omitted].

[62] *Commercial Arbitration in Canada* at para 2:30.40.

[108] In *Dynatec*, the subcontract stated that "the Subcontractor shall be entitled to rely on the provisions in the Prime Contract in favour of the Contractor in the performance of obligations under this Subcontract . . . ."[63] But this wording was held not to be distinct or specific enough to incorporate by reference the prime contract's arbitration provision. So it appears that the subcontract must specifically refer to the arbitration provision by name and explicitly incorporate it.

[109] The *Dynatec* case was applied in an Alberta case concerning incorporation by reference of a guarantee provision,[64] which was itself followed by another Alberta case concerning a specialized payment provision.[65]

[110] Oddly enough, courts are much more lenient when it comes to international arbitration. These statutes often have a provision based on the UNCITRAL Model Law which addresses incorporation by reference. For example, British Columbia's *International Commercial Arbitration Act* provides that a "reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."[66] International cases interpreting this provision routinely hold that it "is sufficient that the reference be to the document containing an arbitration clause, without specifically referring to the arbitration clause . . . ."[67] Moreover, this is so whether the preceding document is a contract between the same parties, one party and a different person, or between completely different persons.

[111] ALRI doubts whether using a similarly worded legislative provision in the Alberta Act would suffice to accomplish the same thing, given the strict Canadian case law which already exists in this area. Much more explicit language than what is used in the international model would be needed to accomplish that same result in a domestic arbitration statute.

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[63] *Dynatec*, note 61 at para 4.

[64] *QQR Mechanical Contracting Ltd v Panther Controls Ltd*, 2005 ABQB 58 at para 17.

[65] *Online Constructors Ltd v Speers Construction Inc*, 2011 ABQB 43 at paras 17-18.

[66] *International Commercial Arbitration Act*, RSBC 1996, c 233, s 7(5).

[67] *Commercial Arbitration in Canada* at para 2:30.40.

[112] In any event, ALRI does not support creating a legislative presumption to assist with incorporating arbitration clauses by reference. Once again ALRI would apply the fundamental principle of party control consistently in the Alberta Act. Successfully achieving the desired incorporation by reference is a contractual drafting issue that is the parties' responsibility to accomplish in their arbitration agreement.

8. ADDITION OF CONSENTING PARTIES BY ARBITRATOR

[113] A respondent suggested that:

> Where a third party asks or consents to be added to an arbitration, it would be useful to provide a default rule in the legislation that a party to the arbitration can apply to the arbitrator to have the third party added and the arbitrator may decide whether it is necessary or beneficial to add the third party . . . . It should be possible for parties to an arbitration agreement to opt out of this provision of the legislation . . . .

[114] Currently, no modern Canadian arbitration statute specifies this particular default rule, although they all state that the arbitral tribunal may determine the procedure of the arbitration. The Uniform Act is to the same effect. The UK Act does not have such a provision either.

[115] If the existing arbitration parties and the new proposed non-signatory party all consent to the expanded arbitration, it would appear that the suggested reform is already doable:[68]

> Associated persons may also be included in the arbitration by agreement of the parties. In this regard, the arbitration agreement may expressly refer to the fact that it is to bind successors, assigns or other specified persons. Further, additional parties may simply agree with existing parties that a dispute should be submitted to arbitration after it has come into existence. . . . It is also possible that a non-party may agree that the award will be binding on it.

[116] However, if the respondent is suggesting instead that an arbitrator should be able to add a new consenting party over the objections of an existing arbitration party, that would constitute a major modification of

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[68] *Commercial Arbitration in Canada* at para 2:110.70 [footnotes omitted].

the principle of party control as it would force the non-consenting party to arbitrate against his or her will. ALRI does not advocate or support such a reform.

CHAPTER 4

Appeal Issues

[117] Section 44 of the Alberta Act governs appeal of arbitral awards:

> **Appeal of award**
>
> **44(1)** If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.
>
> **(2)** If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.
>
> **(3)** Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.
>
> **(4)** The court may require the arbitral tribunal to explain any matter.
>
> **(5)** The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.
>
> **(6)** Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

[118] Under section 44(1), an arbitration agreement may provide that the arbitral award can be appealed to a court on a question of fact, a question of law or a question of mixed fact and law, as the parties agree.

[119] However, even if the agreement does not provide for an appeal on a question of law, section 44(2) states that the parties may nevertheless appeal to a court on a question of law if the court grants leave to appeal. Section 3 of the Alberta Act states that parties cannot by agreement vary or exclude the availability of section 44(2)'s appeal by leave.

[120] The ALRI RFD explored two specific issues that have arisen under section 44. The first issue concerns appeals by leave to the Court of Queen's Bench. Before granting leave to appeal under section 44(2), the court must be satisfied about two criteria as stated in that section: "(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and (b) determination of the question of law at issue will significantly affect the rights of the parties." However, case law has sought to impose a third criterion, namely, that a public interest requirement must be met before leave to appeal can be granted under section 44(2). Although the legislation is clearly silent on this point, a significant line of Alberta case law has read in such a requirement. A smaller number of other cases has refused to.

[121] The second issue addressed by the ALRI RFD concerns a uniquely Alberta appeal requirement found in section 44(3). Whether an appeal on a question of law occurs by agreement of the parties or by leave of the court, section 44(3) says that a party may not appeal a question of law that the parties expressly referred to the arbitral tribunal for decision. Alberta case law is sharply divided over what this means, resulting in both a wide and a narrow interpretation. The wide interpretation essentially blocks the appeal process and makes any appeal on a question of law virtually impossible.

A. Rethinking Appeals

1. UNDERLYING POLICY TENSIONS

[122] As the ALRI RFD illustrated in its exploration of the two appeal issues mentioned, Alberta courts have produced strikingly divergent lines of case law on issues which essentially concern how accessible arbitral appeals should be. ALRI believes that this situation indicates a more fundamental issue concerning section 44. The policy underlying that section seems to be unclear, ambiguous or even contradictory regarding the relationship between arbitration and the courts. Should the courts be relatively open to arbitral appeals? Section 44(1) and (2) as written seems to suggest so. Section 44(3), on the other hand, seems to suggest not, regardless of whether the parties have agreed that an appeal may be taken. This lack of clarity in the underlying policy leads to insufficient legislative direction for the courts.

[123] In order to resolve these recurrent and underlying policy tensions, ALRI believes that it is time to rethink the role of arbitral appeals in a more fundamental way.

2. WHEN SHOULD COURT APPEALS BE POSSIBLE?

[124] The decision whether to allow appellate access to the courts has always been a balancing act between competing policy considerations. What are the most prevalent, although sometimes contradictory, opinions about how this balance should be achieved?

[125] It is often asserted that appeals reduce the speed, finality and confidentiality of arbitration.[69] Parties can try to use the appeal process simply as leverage for settlement or to delay enforcement of the arbitral award.[70] Whether by agreement or by leave of the court, appeals are "predictably messy, time-consuming and expensive."[71] Commercial parties in particular are urged to exclude "to the fullest extent"[72] the availability of appeal in their arbitration agreements and to fully embrace arbitral awards as final.

[126] The main justification usually advanced for maintaining an appeal route to the court is to allow better justice to be done between the arbitrating parties. Parties recognize this when their arbitration agreement creates the right to a court appeal, as provided in section 44(1). According to this view, if parties want a court appeal, they should have access to the courts like any other citizen. The contrary view is that such access seems to contradict the parties' original choice to seek their justice outside the court system. The proponents of this position say that if the parties want the safety net of appeal protection, they could provide in the arbitration agreement for an appeal to another arbitral tribunal. Such private appeals preserve confidentiality and may be faster.[73] A related assertion is that the parties have agreed to pay privately for an arbitration, but the cost of an

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[69] *Commercial Arbitration in Canada* at para 10:10.

[70] *Dispute Resolution*, note 14 at 653, n 4.

[71] Douglas F Harrison, "Drafting the Arbitration Clause: Ensuring an Effective and Predictable Process" in Osgoode Hall Law School of York University, *Negotiating and Drafting Arbitration Clauses in Commercial Agreements* (Toronto: Emond Montgomery Publications, 1997) at Tab 7, at 3.

[72] Richard B Potter, "The Pizza Pizza Quartet: Four Pizzas with Extra ADR and Hold the Appeals!" (1996) 23 BLR (2d) 277 at 283.

[73] Randy Pepper, "Ten tips to reduce time and costs in arbitration", *The Lawyers Weekly* (17 June 2011) 10, at 12.

appeal judge, courtroom and related support is publicly funded. These critics suggest that arbitration parties should, therefore, privately create and pay for their own appeal mechanism if one is needed.

[127] Whether an appeal route exists by agreement or by leave of the court on a question of law, a main form of justice that a court can provide is to correct wrong interpretations of the law by arbitrators. It is often asserted that the advantages of arbitration should not be purchased at the cost of substantive legal accuracy.[74]

[128] Others point out, however, that unlike court decisions, arbitral decisions do not serve as precedents for other arbitrators or for any other decision-makers. If an individual decision is wrong on a point of law, there is often no continuing damage done to the general legal principle because other arbitrators are unlikely to hear of that arbitral decision and are not obliged to follow it even if they do. The assumption that a court appeal is needed to correct and protect the general legal principle may be a misplaced application of concerns more appropriate to the common law system of precedent and *stare decisis*. As stated by the dissenting commissioner in the Law Reform Commission of British Columbia's *Report on Arbitration*:[75]

> To men of commerce a mechanism to resolve disputes is a necessary evil en route to accomplishing their own business goals. It is we, the lawyers, who insist on redress for a decision which is wrong in law. It is worth noting that the arbitrators, generally speaking, do not consider themselves bound by other arbitrators' decisions, even, in some cases, where a similar dispute occurs between the same parties. That, in my view, indicates that the parties they serve are more concerned with resolving a dispute than establishing a body of precedent or arbitral law.

[129] Proponents of this view assert that a wrong legal interpretation in an arbitral decision generally affects only the parties to that arbitration. If the arbitrator misunderstands or misapplies settled law, it is indeed unfortunate for one of those parties. But, on the other hand, they freely bargained and agreed to use an arbitrator to decide their legal rights instead of the judicial process.

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[74] *Commercial Arbitration in Canada* at para 10:10.

[75] Law Reform Commission of British Columbia, *Report on Arbitration*, Report 55 (1982) at 88.

[130] However, where an arbitrator is trying to apply law that is already unclear or unsettled, others argue that it is beneficial to be able to appeal that question of law to a court. The court's ruling on the proper interpretation not only resolves the issue for those parties, but means the law can be correctly applied in other arbitration cases. Some assert that one of the dangers of widespread arbitration in a particular area of legal practice is that development of that body of law can disappear from the general supervision of the courts. Having courts settle legal uncertainty in this situation can result in industry- or class-wide benefits.

[131] A contrary view, however, asks hard questions about these assumptions. No one expects settlement negotiations, private mediation or even judicial mediation to advance or clarify the state of substantive law. Those techniques freely operate in private between the parties without the burden of such expectations. Why shouldn't arbitration? One legal author has argued that, like other consensual dispute resolution processes, arbitration has the right ***not*** to concern itself with the general development of the law:[76]

> It is sometimes said that the increasing use of arbitration to settle business disputes hampers the development of the law.
>
> . . .
>
> This applies not only to disputes that are resolved by arbitration but to those resolved by other consensual processes, such as negotiation, conciliation and mediation, including judicial mediation.
>
> . . .
>
> Much of the development of the law is really a dialogue among different levels of court over time about how particular types of cases should be decided. Arbitration is not part of the court system and arbitrators are not part of that dialogue. Their sole focus is to decide the particular dispute between the parties and, when necessary, to apply the broad principles of the law as they find them.

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[76] William Horton, "Arbitration and the development of the law", *The Lawyers Weekly* (14 September 2012) 12, at 12-13.

. . .

> [B]y choosing arbitration, the parties and their lawyers are giving priority to the decision of the specific case under existing law over the refinement of legal principles over time. Freedom of contract and the consensual basis of arbitration allows them to make that choice.

[132] Taking all these considerations together, is a new balance needed between arbitration and the courts? Modern arbitration is designed to exist outside the court system. Is it time to exclude court appeals and make arbitration a truly self-contained dispute resolution mechanism? On the other hand, if court appeals do serve a necessary function, should they instead be available only where the parties agree? Or should an appeal on a question of law, with leave of the court, continue to be available?

3. CONSULTATION FEEDBACK

[133] Consultation opinion favoured retaining appeals by agreement of the parties. Four respondents specifically advocated such retention, while only one respondent advocated abolition.

[134] Feedback was more evenly split on the issue of appeals by leave of the court on a question of law, with a slight edge advocating abolition. Four respondents favoured retention. One of those respondents, however, would amend section 3 so that the parties could agree to contract out of that appeal provision.

[135] Five respondents argued for abolition of appeals by leave of the court on a question of law. They preferred a strict application of the principles of party control and restricted court intervention.

4. RECOMMENDATIONS FOR REFORM

[136] ALRI fully supports the continued presence of section 44(1) in the Alberta Act so that parties can, by agreement, appeal to the Court of Queen's Bench on whatever basis they decide. This promotes the principle of party control over the arbitral process.

[137] For all the reasons stated in Chapter 2, ALRI believes that the concurrent principle of restricted court intervention should be reaffirmed and strengthened in the Alberta Act. The uniform Canadian model followed by various provincial statutes generally allows an appeal on a

question of law with leave of the court. However, there are exceptions. Nova Scotia's legislation allows appeals only by agreement of the parties. There is no appeal by leave of the court.[77] Quebec's arbitration legislation, which applies both to non-international and international arbitration, has no appeal provisions.[78]

[138] ALRI recommends that section 44(2) be repealed, such that the only appeal route to the courts will be by agreement of the parties. ALRI considered an alternative method of enhancing party control in this area by retaining section 44(2) but removing section 3's prohibition on parties contracting out of such appeals. A joint submission from two respondents advocated this approach. Respecting contractually-agreed privative clauses which block court appeals would make an arbitral award truly final and binding, they said. This is true, but ALRI prefers the more direct approach of simply statutorily removing appeals by leave of the court on a question of law. This is the best way of affirming the fundamental principles of party control and restriction of court intervention.

[139] It is important to remember that, even if section 44(2) is repealed and the parties choose not to agree to an appeal under section 44(1), a party can still apply to court in appropriate circumstances to set aside an arbitral award under section 45 of the Alberta Act. This statutory procedure is the equivalent of judicial review and addresses fundamental issues relating to jurisdiction, procedural fairness and fraud. So judicial intervention would remain available to protect parties in those critical situations. Under section 3 of the Alberta Act, parties cannot agree to vary or exclude that protection.

[140] ALRI wrestled with the concern that repealing section 44(2) will adversely affect parties who are disadvantaged by a weaker bargaining position. Some consumer and family law parties cannot negotiate their arbitration agreements from a truly level playing field due to power imbalances. Since their agreements are unlikely to contain an agreed court appeal, removing section 44(2) will prevent any access by leave of the court, no matter how difficult that leave may be to obtain in most circumstances anyway.

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[77] Nova Scotia Act, note 21, s 48.

[78] arts 940, 940.6, 947 CCP.

[141] ALRI believes this concern is best addressed as was done previously in Chapter 3. ALRI does not propose creating different appeal models in the Alberta Act for different types of parties, an option discussed in the ALRI RFD.[79] Where special treatment or protection is warranted for certain types of parties or situations, those provisions should be contained in specialized legislation dealing with that legal area, not in a general statute like the Alberta Act which is designed to apply by default. Enacting such special protection would require an in-depth project and extensive consultation in its own right, exceeding the narrow and specific boundaries of this project.

RECOMMENDATION 5

Section 44(1) should remain as currently provided in the Alberta Act.

RECOMMENDATION 6

Section 44(2) of the Alberta Act should be repealed.

B. Other Issues Raised in the ALRI RFD

1. PUBLIC INTEREST REQUIREMENT FOR LEAVE TO APPEAL

[142] The recommended repeal of section 44(2) renders this issue redundant.[80] For the record, however, no respondent in the consultation feedback supported any kind of mandatory public interest requirement in obtaining leave to appeal.

2. THE APPEAL BARRIER OF SECTION 44(3)

[143] Whether an appeal on a question of law occurs by agreement of the parties under section 44(1) of the Alberta Act or by leave of the court under section 44(2), it is subject to the additional hurdle of section 44(3) which reads:

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[79] See ALRI RFD at 40.

[80] For those who would like to read a full discussion of this issue, see Chapter 3 of the ALRI RFD at 21-29.

> (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

[144] ALRI's recommended repeal of appeals on a question of law by leave of the court will render this issue redundant insofar as it concerns section 44(2). However, it remains relevant for appeals on a question of law by agreement of the parties. Therefore, section 44(3)'s ongoing presence in the Alberta Act still needs to be reviewed.

a. Background

[145] Section 44(3) was added during the legislative process which implemented the 1988 ALRI Report. No such provision appeared or was recommended in the ALRI Report.

[146] A major aspect of Alberta's original arbitration reform was to enact an appeal provision in place of the court's former discretion to set aside an arbitrator's decision for error on the face of the award. Under the old law, a court would refuse to exercise its discretion to set aside the award if the error concerned the very question originally submitted to the arbitrator for decision.[81] The government chose to retain this old common law rule and to reinsert it into the new appeal process.

b. Conflicting Alberta Case Law

[147] In both formal reasons and *obiter* comments, Alberta Court of Queen's Bench case law is sharply divided on the proper interpretation of section 44(3). This conflict has resulted in a competing "wide view" and "narrow view" of the meaning of this section.

[148] The wide view interprets section 44(3) so broadly that if the general subject-matter of the original arbitration necessarily involves answering questions of law, then no appeal on any question of law in that area is possible either by agreement or by leave. It is not necessary for the question of law as framed on appeal to have been specifically posed to the arbitrator.[82] So for example, where the parties' arbitration agreement

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[81] *Ellsworth v Ness Homes Ltd*, 1999 ABQB 287 at para 29.

[82] *Pachanga Energy Inc v Mobil Investments Canada Inc* (1993), 138 AR 309 (QB), aff'd on other grounds (1993), 149 AR 73 (CA); *Willick v Willick* (1994), 158 AR 52 (QB) [*Willick*]; *Co-operators General Insurance Co v Great Pacific Industries Inc*, 1998 ABQB 137, aff'd on other grounds 1998 ABCA 272; *Apache Canada Ltd v Harmattan Gas Processing Limited Partnership*, 2010 ABQB 288; *Fuhr Estate v Husky Oil Marketing Co*, 2010 ABQB 495.

submitted "spousal support . . . [and] such other issues that arise out of the above" to the arbitrator, the arbitral award cannot be appealed on any question of law whatsoever concerning spousal support.[83]

[149] The narrow view of section 44(3) interprets it as applying only to discrete, specific questions of law which were expressly posed to the arbitrator for decision.[84] Here, for example, the same phrase "spousal support . . . [and] such other issues that arise out of the above" was held in *Seneviratne v Seneviratne* not to constitute questions of law expressly referred to the arbitral tribunal. It did not prevent the parties from being able to appeal on questions of law concerning entitlement and quantum of support. The reasoning is that general issues submitted to arbitration are properly classified as questions of mixed fact and law, not as questions of law. Accordingly, section 44(3) does not bar any appeal subsequently brought on a question of law alone that deals with the same subject area as the arbitration.[85]

[150] If the wide view is correct, it is hard to see how anything could ever be appealed on a question of law. What legal dispute does not involve broad questions of law? By making any appeal on a question of law virtually impossible, the wide interpretation of section 44(3) essentially blocks the appeal process ostensibly established for questions of law under section 44. The Court of Queen's Bench in *Willick* stated that the legislature's intention in enacting section 44(3) is clear – to limit the role of the court in the arbitration process.[86]

[151] Cases adopting the narrow view often rely on an article by William Hurlburt which advances and supports that view.[87] Since section 44(3) codifies the old common law rule which governed the court's former discretion to set aside an arbitral award for error on the face of the award, Hurlburt examined how the prior case law dealt with the issue. The

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[83] *Willick*, note 82 at paras 34-36, 40 [emphasis omitted].

[84] *Seneviratne v Seneviratne*, 1998 ABQB 289; *Oakford v Telemark Inc*, [2001] AJ No 853 (QL) (QB); *Metcalfe v Metcalfe*, 2006 ABQB 798; *Heredity Homes (St Albert) Ltd v Scanga*, 2009 ABQB 237; *Frank v Vogel & Company LLP*, 2012 ABQB 432; *Central Alberta Rural Electrification Assn (Contract Policy Committee) v FortisAlberta Inc*, 2012 ABQB 653.

[85] *Seneviratne v Seneviratne*, 1998 ABQB 289; *Metcalfe v Metcalfe*, 2006 ABQB 798.

[86] *Willick*, note 82 at para 39.

[87] William H Hurlburt, "Case Comment: *Willick v Willick*: Appeals from Awards Under the *Arbitration Act*" (1994) 33 Alta L Rev 178 [Hurlburt Case Comment]. The article identifies Mr. Hurlburt as Director Emeritus of ALRI.

Supreme Court of Canada relied on UK authority for two central principles governing this area.[88] First, "where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court . . . ."[89] Second, in deciding what constitutes the "very question" referred to arbitration, it is essential[90]

> . . . to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. . . . [I]n the former case the Court can interfere if and when any error of law appears on the face of the award, but . . . in the latter case no such interference is possible . . . .

[152] Hurlburt restates this prior formulation in the following way. Section 44(3) prevents an appeal of any identifiable question of law that is expressly referred to the arbitrator. It does not prevent an appeal of any question of law that arises during the arbitration.[91]

[153] Alberta cases which adopt the wide view of section 44(3) never refer to any of this old case law. However, Hurlburt's restatement has been criticized in one Court of Queen's Bench decision as being inconsistent with how arbitrations occur in practice:[92]

> With respect, whilst I accept the distinction made by Hurlburt between "an identifiable question of law" and "any question of law that arises during the arbitration," in my view, the decisions in *Seneviratne* and *Metcalfe* may have taken those distinctions too literally. It would be exceedingly rare that a party would expressly refer a question like "What is the correct approach to use to determine retroactive support?" or "When can income averaging be used to determine child or spousal support?" Surely, when the question referred to the arbitrator is "the amount of child support", this includes any questions of law and the questions of mixed fact and law required to answer the question. In my view, if the matter expressly referred to the Arbitrator necessarily includes the

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[88] *Toronto Police Association v Board of Commissioners*, [1975] 1 SCR 630 at 653, 655.

[89] *Government of Kelantin v Duff Development Company Limited*, [1923] AC 395 at 409 (HL).

[90] *F R Absalom, Limited v Great Western (London) Garden Village Society, Limited*, [1933] AC 592 at 607 (HL).

[91] Hurlburt Case Comment, note 87 at 186.

[92] *Fuhr Estate v Husky Oil Marketing Co*, 2010 ABQB 495 at para 111.

> question subject to appeal, then it is a question of law that was expressly referred to the Arbitrator. This is in keeping with the Act's purpose of limiting judicial intervention where the parties have indicated their intention to use an alternative dispute mechanism.

c. Other Canadian Jurisdictions

[154] No other Canadian arbitration statute contains an equivalent of Alberta's section 44(3).

[155] As mentioned earlier, section 44(3) did not originate in the 1988 ALRI Report but was added to the 1991 Alberta Act during the legislative process. The original Uniform Act promulgated in 1989-1990 by the ULCC was based on ALRI's work and so did not contain an equivalent of section 44(3). This probably explains why the Ontario, New Brunswick and Saskatchewan Acts are similarly silent, since they were based on the original Uniform Act. It is unknown, however, whether any of those jurisdictions first considered and rejected the Alberta Act's approach.

[156] In 1995, the ULCC amended the Uniform Act to bring its appeal provisions into line with the enacted Alberta Act. But the ULCC adopted only a modified version of section 44(3). An appeal by leave is made expressly subject to that provision. An appeal by agreement of the parties is not subject to it. There was no discussion about this provision in the ULCC proceedings.[93] But the likeliest reason for the modification is that statutorily blocking an appeal created by the parties' own agreement might constitute an unwarranted infringement of the principle of party control by defeating their intention. In addition, applying section 44(3) to section 44(1) produces the odd and rather disconcerting result of making it easier to appeal a question of fact or mixed fact and law than it is to appeal a question of law, since the former will always be broader than section 44(3)'s restriction and so will escape its blocking effect.

[157] The modified provision is also used by Prince Edward Island in its unproclaimed 1996 statute based on the 1995 Uniform Act.[94]

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[93] Uniform Law Conference of Canada, *Proceedings of the Seventy-seventh Annual Meeting* (August 1995) at 39, Appendix B. See Uniform Act, ss 45(1)-(3).

[94] PEI Act, note 21, s 45(1)-(3) [unproc].

[158] The 1996 British Columbia Act was not based on the Uniform Act and does not contain an equivalent of section 44(3) in any event. The British Columbia Supreme Court held that the British Columbia Act's silence means that the old common law rule no longer exists in that province. It has been replaced by the statutory criteria for leave to appeal. Nor is the old rule a factor in the court's residual discretion concerning leave.[95]

[159] Both Manitoba and Nova Scotia based their Acts on the 1995 Uniform Act but presumably made a deliberate choice to exclude any such provision, modified or otherwise, in this area. The Manitoba Law Reform Commission had recommended adoption of the Alberta Act, but Manitoba still excluded any equivalent of section 44(3) in its Act.[96]

d. Consultation Feedback

[160] No respondent supported the wide view of section 44(3). Four respondents advocated repealing this provision altogether.

e. Recommendation for Reform

[161] Whatever purpose section 44(3) might have served in limiting appeals on a question of law by leave of the court, it serves no good purpose to apply a similar restriction to appeals on a question of law by agreement of the parties. In that respect, ALRI agrees with the Uniform Act's revised version and with the complete absence of a similar section in other provinces' legislation. The principle of party control outweighs the principle of restricted court intervention in this area. We recommend the repeal of section 44(3) and its appeal barrier.

RECOMMENDATION 7

Section 44(3) of the Alberta Act should be repealed.

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[95] *Kovacs v Insurance Corp of British Columbia* (1994), [1995] 23 Admin LR (2d) 142 (BCSC).

[96] Manitoba Law Reform Commission, *Arbitration*, Report 85 (1994).

C. Other Issues Raised in the Consultation Feedback

1. THE PRIVATIZATION OF CIVIL JUSTICE

[162] A legal comment published about the ALRI RFD suggested a new policy factor for consideration when devising an arbitral appeals policy:[97]

> Arbitration is just one aspect, albeit an important aspect, of a more general trend toward privatizing the Canadian civil justice system. Limits on appeals from arbitral awards obviously play a role in publicizing or privatizing the disputes heard by arbitrators and the awards they make. While there are some benefits to these privatizing initiatives, there are costs as well.

[163] An academic article cited in the comment elaborates on the perceived dangers of such privatization:[98]

> Without public scrutiny – through open court processes, the publication of precedents and the application of case law to the facts to be adjudicated – there is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness.

The article characterizes a privatized system as putting traditional democratic rights and freedoms at risk. Such privatization should proceed only:[99]

> . . . with full disclosure to the public regarding the rationalizations for, and implications of, these tools. To date, the public is largely unaware of the aggressive and systematic privatization of its public civil justice system. The resulting democratic deficit jeopardizes one of the foundational tenets of our civil justice system and our common law system of governance as a whole.

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[97] Jonette Watson Hamilton, "Discuss: Stay and Appeal Issues in the Alberta Arbitration Act" (6 September 2012), online: University of Calgary Faculty of Law, ABlawg <http://ablawg.ca/2012/09/06/discuss-stay-and-appeal-issues-in-the-alberta-arbitration-act/#more-1652>.

[98] Trevor CW Farrow, "Privatizing our Public Civil Justice System", *News & Views on Civil Justice Reform* 9:1 (Spring 2006) 16 at 16, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/news_and_views/newsviews09-en.pdf>.

[99] Trevor CW Farrow, "Privatizing our Public Civil Justice System", *News & Views on Civil Justice Reform* 9:1 (Spring 2006) 16 at 17, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/news_and_views/newsviews09-en.pdf>.

[164] ALRI believes that government and public bodies should indeed be slow to choose arbitration of disputes for this very reason. They owe a duty of transparency to the public, both from a democratic point of view and because public money is often at the heart of such disputes. However, when it comes to disputes between private persons, ALRI believes that it is better to foster a system where parties can work out their own problems if possible. Private parties are entitled to negotiate, settle, mediate or arbitrate their disputes confidentially. One method of alternate dispute resolution should not be singled out from the others as less deserving of that right to confidentiality.

2. THE ROLE OF THE COURT OF APPEAL

a. No Appellate Role

[165] A respondent proposed that, while appeal on a question of law should be available to arbitration parties, there should be no appeal beyond the Court of Queen's Bench.

[166] In most of the other modern Canadian arbitration statutes, there is the possibility of a further appeal to the Court of Appeal, with leave. This is the case in Alberta as well.[100] Only the unproclaimed PEI Act has no leave requirement. As mentioned previously in Chapter 3, the BC Act is generally silent on appeals to the Court of Appeal. Section 69(8) of the UK Act allows an appeal to the Court of Appeal with leave, but it specifies that leave "shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

[167] ALRI notes that, in the area of administrative law, appeals from the Court of Queen's Bench to the Court of Appeal may occasionally be restricted.[101] However, this is typically not a standard practice in that area of the law either.

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[100] Alberta Act, s 48.

[101] See e.g. *Mental Health Act*, RSA 2000, c M-13, ss 43(1), 43(5) (order or decision of review panel may be appealed to Court of Queen's Bench from which there is no further appeal); *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006, ss 23(1), 24 (order of tenancy dispute officer may be appealed to Court of Queen's Bench from which there is no further appeal); *Safer Communities and Neighbourhoods Act*, SA 2007, c S-0.5, ss 48(1), 50 (removal order concerning a fortified building may be appealed to Court of Queen's Bench from which there is no further appeal).

[168] ALRI has already recommended that any right to a court appeal under the Alberta Act must be by agreement of the parties. If the parties have agreed that the court system may be accessed as part of their arbitral process, the principle of party control suggests that such access should be the same as for any other litigant who engages the court system. Therefore, ALRI is not prepared to recommend that appeals from the Court of Queen's Bench be curtailed.

b. Sole Appellate Role

[169] Another respondent proposed that any arbitral appeal should go directly to the Court of Appeal, bypassing the Court of Queen's Bench.

[170] If arbitral appeals were to go directly to the Court of Appeal, then conceptual consistency within the Alberta Act would require the same route for an application to set aside an arbitral award under section 45. As noted, such an application is the Alberta Act's equivalent of judicial review. Appellate courts are rarely the court of first instance for judicial review, although exceptions exist involving the Ontario Divisional Court and certain applications to the Federal Court of Appeal.[102] For decades, both of these appellate courts have been conducting judicial review at first instance without any apparent difficulties or concerns, however.

[171] The Uniform Act and all the modern Canadian arbitration statutes specify that appeals go to each province's equivalent of the Court of Queen's Bench. The UK Act specifies the High Court or a County Court. Manitoba has a unique provision that the usual requirements do not apply to "an arbitration agreement that provides for an appeal to The Court of Appeal where the Minister of Justice is satisfied that the arbitration relates to a matter of major importance to the province".[103] In other words, an arbitral appeal may go directly to the Court of Appeal but only if the Minister of Justice permits it under special circumstances.

[172] ALRI is not persuaded that Alberta should depart from the uniform approach concerning arbitral appeal routes. In addition, applications for judicial review in Alberta are in most cases first heard by the Court of

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[102] *Judicial Review Procedure Act*, RSO 1990, c J.1, s 6(1); *Federal Courts Act*, RSC 1985, c F-7, s 28.

[103] Manitoba Act, note 21, s 44(5).

Queen's Bench as well.[104] It is best that section 45 of the Alberta Act retain a symmetrical process for arbitration's equivalent of judicial review.

[173] Therefore, ALRI affirms that the Court of Queen's Bench should continue to be the court of first instance for arbitral appeals by agreement of the parties under section 44(1) and for applications to set aside an arbitral award under section 45.

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[104] Only when judicial review is sought against a Court of Queen's Bench justice does the Court of Appeal hear the application at first instance.

CHAPTER 5

Transitional Issues

[174] A respondent to the ALRI RFD consultation expressed concern about whether any changes recommended by ALRI and enacted by the government would apply to existing arbitration agreements or only to those created after the revised legislation came into force.

[175] When the Alberta Act was first enacted, it came into force on September 1, 1991 and contained the following transitional provision:

> **Transitional**
>
> **56(1)** This Act applies to arbitrations conducted under arbitration agreements made before September 1, 1991 if the arbitration is commenced on or after September 1, 1991.
>
> **(2)** Notwithstanding its repeal by section 58, the Arbitration Act (RSA 1980 cA-43) continues to apply to arbitrations that are commenced before September 1, 1991.

[176] So the determining factor in the application of the Alberta Act was the commencement date of the arbitral process, not the date of the arbitration agreement. Any arbitration which was already underway when the new Act came into effect was allowed to proceed under the old law. This is a conventional way of handling the effective date of legislative changes made to procedural provisions.

[177] ALRI advocates a similar transitional provision for implementation of our current recommendations. As in the original Alberta Act, a reasonable period of time should be given before the amendments come into force so that parties can review their arbitration agreements and make changes if necessary. When the Alberta Act was first enacted, two months elapsed between the date of Royal Assent and the date when the statute came into force.

[178] The repeal of section 44(2)'s appeal on a question of law with leave of the court should not, in and of itself, have a great effect on existing arbitration agreements. From a practical point of view, parties are unlikely to have relied on its availability when drafting the agreement. If an appeal provision is crucial, the parties would have included one by agreement instead. That ability will remain unaffected by ALRI's proposed changes.

RECOMMENDATION 8

Amendments to the Alberta Act implementing these recommendations should apply to any arbitration that is commenced on or after the date on which the statutory amendments come into force, regardless of when the arbitration agreement was made.

RECOMMENDATION 9

Amendments to the Alberta Act implementing these recommendations should come into force following a stated period of time sufficient for parties to review their existing arbitration agreements and make changes if necessary.

JS PEACOCK QC (Chair)

ND BANKES

PL BRYDEN

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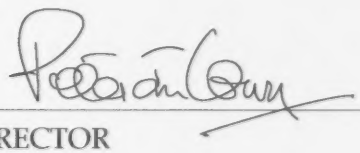

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